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Supreme Court, U.S.
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No. 03-107

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Authorities ii
Interest of Amicus Curiae 1
Summary of Argument 1

Argument

I. THE EIGHTH CIRCUIT PROPERLY INTERPRETED 25 U.S.C. § 1301 AS CREATING A DELEGATED FEDERAL POWER RATHER THAN AS A GRANT OF SOVEREIGNTY 6

1. The historical background of the ICRA and plain language of its amendments indicate that Congress did not bestow sovereign power on Indian tribes to prosecute non-member Indians 8
2. Constitutional and congressional silence required this Court to construe the limits of aboriginal sovereignty remaining to Indian tribes 12
3. Appellate courts correctly have construed § 1301 as conferring delegated power due to the practical effect of the statute against the legal background in which it arose 17
4. Construing § 1301(2) as conferring delegated prosecutorial power remedies the jurisdictional gap created by Duro, protects tribal interests in protecting local interests, and does not infringe on any substantial federal interest 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES: ***Page***

City of Boerne v. Flores, 521 U.S. 507 (1997) 18

Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965) 25

Duro v. Reina, 495 U.S. 676 (1990) ..... *passim*

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 22

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 21

Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998) 17, 18, 19, 20

Nevada v. Hicks, 533 U.S. 353 (2001) 13

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 13, 19, 20

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) 20, 21

United States v. Lara, 324 F.3d 635 (8th Cir. 2003)(en banc) 23

United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998) .. 19

United States v. Weaselhead,165 F.3d 1209 (8th Cir. 1999) (en banc) 20

United States v. Weaselhead, 36 F.Supp.2d 908 (D.Neb. 1997) 19

United States v. Wheeler, 435 U.S. 313 (1978) 14, 15, 20

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const., Art. I, § 8, cl. 3 12
U.S. Const., Art. II, § 2, cl. 2 12
U.S. Const., Art. VI, § 2 12

18 U.S.C. § 13 25
18 U.S.C. § 1152 10
18 U.S.C. § 1153 ..... 10, 27
18 U.S.C. § 1162 ..... 2, 9
18 U.S.C. § 1162(a) 10
18 U.S.C. § 1162(c) 10

25 U.S.C. § 1301 ..... *passim*
25 U.S.C. § 1301(2)(1968) 9
25 U.S.C. § 1301(2)(1990) 16
25 U.S.C. § 1301(4)(1990) 10
25 U.S.C. § 1302 (1968) 9

42 U.S.C. § 1983 14

25 C.F.R. § 11.100 (2003) 25

MISCELLANEOUS:

Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, § 201, 82 Stats. 77 (Apr. 11, 1968) 8
Public Law 280, ch. 505 §2, 67 Stat. 588 (Aug. 15, 1953) ... 9
Public Law 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (Nov. 5, 1990) 16

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the Double Jeopardy Clause of the Fifth Amendment. In

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[1]Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, Amicus states that no counsel for a party authored any part of this brief, and no person or entity, other than Amicus, its members, and its counsel, made a monetary contribution to the preparation of submission of this brief.

furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

SUMMARY OF ARGUMENT

1. The language of Title 25, United States Code, Section 1301, as amended, does not confer sovereign power, as such grant is not specifically contained in the statute. Rather, the statute confers the power to prosecute, limited to those Tribes that have retained criminal jurisdiction over their own members. The 1990 amendments to the ICRA did not act to repeal Public Law 280, *codified in relevant part*, 18 U.S.C. § 1162, nor did it exempt non-member Indians otherwise covered by Public Law 280 from the ICRA.

Because the language of the amended statute is ambiguous in light of the overall structure of criminal jurisdiction over Indians, and that ambiguity is not resolved by the legislative history, the Eighth Circuit was obliged to read

the statute in a manner consistent with the structure of current and historical Indian criminal jurisdiction.

2. Prior to this Court's decision in Duro v. Reina, 495 U.S. 676 (1990), the Court's common-law holdings established certain limits to sovereign powers retained by the Indian tribes in light of their status as dependent sovereigns. Such rulings were proper given the absence of parameters to aboriginal sovereign powers in either the Constitution or the laws of the United States. The limits established by this Court have been relied upon not only to reach the result in Duro, but also in other cases involving questions of retained aboriginal sovereignty.

Congress did not express any dissatisfaction with such rulings until the Duro opinion. The source of that dissatisfaction stemmed from the gap in prosecutorial authority over misdemeanors created by that decision. In order to remedy that gap, Congress amended Title 25, United States Code,

Section 1301. Such amendments, however, did not constitute a grant of sovereignty.

3. Appellate decisions construing the amendments to Title 25, United States Code, Section 1301, recognize the tension between the practical effects of the language enacted and the legislative intent expressed in passing the amendments. However, such courts largely have relied on settled principles of statutory construction to hold that the amendments conferred delegated power rather than sovereign power. The single case to the contrary, decided by the Ninth Circuit, is incompatible with settled notions of the separation of powers doctrine necessitated by the tri-partite form of our federal government.

Given the grave constitutional questions which would arise under the Ninth Circuit's construction of the amended ICRA, the Government now suggests that the legislative history may be finessed to support an affirmative grant of sovereignty, rather than conferring delegated federal authority. That argument, however, cannot be supported by the language of the

statute. The question is what Congress *has done,* rather than what Congress *can do.*

4. Reading Title 25, United States Code, Section 1301, to delegate authority to the Indian tribes falling within the ICRA to prosecute non-member Indians is a reasonable construction of the amended section. This construction gives meaning to all parts of the amended statute consistent with its practical application. It preserves the parameters established by Public Law 280 as well as the historical practice of having courts which combine both federal and tribal powers in one body. It addresses the ability of the Indian tribes to maintain internal integrity by establishing criminal jurisdiction over misdemeanor offenses committed by non-member Indians within Indian country without affecting the federal government's ability to prosecute major crimes.

As a delegated authority, federal re-prosecution of such misdemeanors, where jeopardy has attached, violates the Fifth Amendment's Double Jeopardy Clause.

ARGUMENT

I.

THE EIGHTH CIRCUIT PROPERLY INTERPRETED 25 U.S.C. § 1301 AS CREATING A DELEGATED FEDERAL POWER RATHER THAN AS A GRANT OF SOVEREIGNTY

The question upon which review was granted by this Court is "Whether Section 1301, as amended, validly restores the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial authority to the Tribes), such that a federal prosecution following a tribal prosecution for offenses with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment." Brief for Petitioner U.S. at (I). The question accepted by the Court for review does not contain any constitutional question other than under the Fifth Amendment's Double Jeopardy Clause.

The United States concedes that the elements of the crimes for which Billy Jo Lara was prosecuted in tribal and federal courts are the same. *See* Brief for Petitioner U.S. at 7

("The government does not dispute that the tribal assault charge and the federal assault charge involved the same elements ..."). The Double Jeopardy question turns on whether the ability of the Tribe to prosecute Mr. Lara derived from its inherent sovereignty, or whether it was exercising power delegated to it by Congress.

NACDL, as amicus curiae, suggests this question may be answered as a matter of statutory construction without the necessity of reaching many of the constitutional questions raised by Petitioner United States and amici in support of Petitioner. Such questions are addressed primarily in the Brief for Petitioner beginning at 23-44 and 39-43. Similarly, Amicus National Congress of American Indians devotes almost half of its brief to whether the amendment of § 1301 was a constitutional exercise of Congress' power to override federal common law created by the decisions of this Court. However, the Double Jeopardy question may be resolved by a

construction of § 1301 that does not implicate the constitutional questions so raised.

1. The historical background of the ICRA and plain language of the amendments indicate that Congress did not bestow sovereign power on Indian tribes to prosecute non-member Indians.

In order to understand the effect of the amendment of section 1301, one must understand the genesis of this statute, alone, as well and in conjunction with other statutory provisions concerning criminal jurisdiction of Indian tribes. Congress enacted the Indian Civil Rights Act of 1968, Pub. L. 90-284, Title II, § 201, 82 Stat. 77 (Apr. 11, 1968)(ICRA), *codified at* 25 U.S.C. § 1301 *et seq*., in order to guarantee to members of the various Tribes and Indian Nations certain rights which previously were not specifically secured to individual enrolled tribal members.

As part of this statutory structure, Congress provided certain definitions, including the definition of an "Indian tribe," "powers of self-government," and "Indian court." *See* 25 U.S.C. § 1301. In defining certain powers of self-government, the Act

originally provided: "'powers of self-government' means and includes all governmental powers possessed by and Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses." 25 U.S.C. § 1301(2)(1968). The ICRA also provided for certain basic protections to individuals in the exercise of Tribal powers of self-government, including some but not all of the rights set forth in the Bill of Rights of the United States Constitution. *See* 25 U.S.C. § 1302 (1968). Nowhere in the ICRA itself did Congress address any question of inherent Tribal sovereignty to conduct criminal prosecutions.

The ICRA may not have addressed such a question as, at the time the ICRA was passed, Congress had already enacted Public Law 280, ch. 505 §2, 67 Stat. 588 (Aug. 15, 1953), *codified at* 18 U.S.C. § 1162. Public Law 280 explicitly divested certain Tribes of all criminal jurisdiction and invested the power to prosecute crimes committed by or against Indians in specified areas of Indian country to certain States or

Territories. It also provided that the criminal laws of such State or Territory would have the same force and effect within such Indian country as they have elsewhere within the State or Territory. Finally, Public Law 280 provided that the Indian Major Crimes Act, codified at 18 U.S.C. §§ 1152 and 1153, would not apply in the listed areas. *See* 18 U.S.C. § 1162(a),(c).

Nothing in the ICRA, as enacted in 1968, purported to alter the inherent sovereign right to prosecute criminal acts within Indian country that Public Law 280 divested from the Tribes falling within the listed areas. The amendments to the ICRA added the following: **"(4)** 'Indian' means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4)(1990).

Arguably, this section addresses the problem created by Public Law 280 and acts to preserve Congress' having divested certain Indian tribes of all criminal jurisdiction. However, the

language of the ICRA amendment refers to individuals, rather than to Indian tribes as a class, or even a sub-class. Construed as a matter of sovereignty, this section would create a class of enrolled Indians who would be outside of the definition of "all Indians" contained in § 1301(2), and therefore could not be prosecuted as non-member Indians under that section even if they committed a misdemeanor within the territory of an Indian tribe which exercises criminal jurisdiction.

The statutory language is less than a model of clarity as to what power Congress actually conferred by the ICRA amendments. Again, "sovereign" does not appear anywhere in that language. Consistent with the ICRA's purpose of conferring certain constitutional rights on those already subject to criminal prosecution by Indian tribes, it is logical to construe § 1301(4)'s provisions to guarantee those same rights to non-member Indians who may be prosecuted by a tribe not covered by Public Law 280.

2. Constitutional and congressional silence required this Court to construe the limits of aboriginal sovereignty remaining to Indian tribes.

Against the background of both the original ICRA, as well as Public Law 280 (and indeed, the whole relationship between the various Tribes and the United States Government since the inception of our country), this Court was called upon to construe the limits of aboriginal Tribal sovereign authority to prosecute classes of people. Such aboriginal sovereignty is implicit in the Indian Commerce Clause, U.S.Const., Art. I, § 8, cl. 3, as well as the Treaty Clauses, U.S.Const., Art. II, §2, cl. 2; Art. VI, §2. However, neither these constitutional provisions nor any Act of Congress specifically define the scope and limits of aboriginal sovereignty retained by the Indian tribes; that task has fallen to the Court. The most recent of this Court's cases with respect to criminal sovereign jurisdiction are the ones most relevant to the current discussion.

The first case to challenge Indian tribal criminal jurisdiction based on a lack of sovereign power arose in

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). In that case, the Court held that a tribe had no inherent power to prosecute non-Indian residents of its reservation. The Court reasoned that "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." Id., at 210. Although not specifically mentioned, certain Tribes had been divested of their power to prosecute anyone, member or non-member alike, by Public Law 280. Tribes still do not possess such power over non-Indians, as Congress has never seen fit to establish a manner in which it would be acceptable for Tribes to prosecute non-Indians.

This Court has relied on its holding in Oliphant to determine, in other contexts, that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Nevada v. Hicks, 533 U.S. 353, 358-59 (2001)(construing authority of tribal court to adjudicate tort

claims or civil rights claims under 42 U.S.C. § 1983 based on state officials' execution of warrants on allotted land within reservation). Congress has taken no action to alter this continuing interpretation of the limited scope of the aboriginal sovereign power of an Indian tribe.

The second case to raise the question of the extent of tribal sovereign power arose in United States v. Wheeler, 435 U.S. 313 (1978). In that case, a tribal member challenged his prosecution in federal court under the Double Jeopardy Clause after having been convicted of a lesser included offense in the court of his Tribe. Wheeler argued that because Congress has plenary authority to abrogate tribal sovereignty (as it had via Public Law 280 and other enactments), the tribe derived whatever power it retained from the federal government. It therefore exercised delegated power, rather than the power of a separate sovereign. The Court rejected this argument and found that among the "unique and limited" sovereign powers retained

by the tribe was the power to punish "members of the Tribe for violations of tribal law." Id., at 323-24.

In so holding, the Wheeler Court specifically noted that the distinction was not one of racial status (which would be a constitutionally impermissible basis for drawing such distinction), but rather an Indian's membership status. "The areas in which ... implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." Id., at 326. As Wheeler was a member of the Tribe which prosecuted him, that was an act of a separate sovereign, and the Double Jeopardy Clause did not prohibit his re-prosecution by the federal government. *See* id., at 332. Despite the Court's clear statement as to the limits of Indian tribal sovereignty, Congress took no action to alter the scope of that inherent authority.

Congress did not act until after this Court's decision in Duro v. Reina, 495 U.S. 676 (1990). It is true that Congress acted precipitously thereafter, clearly motivated by the concern

expressed by a number of Indian tribes as to the possibility that no sovereign had the authority to prosecute non-member Indians for misdemeanor crimes committed within Indian country.

In Duro, the Court read its prior decisions as meaning that an Indian tribe did not have independent sovereign authority to prosecute an Indian who was not a member of its Tribe (also known as a "non-member Indian"). In reaction to this decision, Congress amended the ICRA. *See* Pub. L. 101-511, Title VIII, § 8077(b), (c), 104 Stat. 1892 (Nov. 5, 1990). This amendment altered the definition of the "powers of self-government" as including "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2)(1990). Although the amendment was couched in terms of "inherent power," it did not specifically confer "sovereign power." Sovereign power need not have been created to remedy the

jurisdictional gap logically created by the Indian tribes' position as dependent sovereigns.

3. Appellate courts correctly have construed § 1301 as conferring delegated power due to the practical effect of the statute against the legal background in which it arose.

Courts have been wrestling with the exact meaning and effect of this amendment since it was enacted. The Ninth Circuit first addressed whether the amendment could be given retroactive effect in Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998). In that case, a non-member Indian filed for a writ of habeas corpus, challenging the power of the Tribe to prosecute him for violations of the Tribal code which occurred between 1978-1988. In granting the writ, the Ninth Circuit found that the Ex Post Facto clause proscribed the prosecution, as at the time of the offenses the Tribe did not have jurisdiction to punish such offenses.

In so holding, the Means court relied on the Duro decision which held that tribes do not have jurisdiction over non-member Indians. *See* id., at 944. Tribes only obtained

jurisdiction to prosecute after Congress amended the ICRA in 1990. "Thus the amendments to the ICRA did constitute a change in the existing law." Id.

The Means court recognized the tension created by the amendment with regard to whether the power to prosecute was delegated federal power, or inherent tribal sovereign power:

> While the legislative history of [the 1990 amendments] suggests that Congress did not intend to *delegate* ... to the tribes [the authority to prosecute non-member Indians], that is essentially the amendment's effect. While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law.

Means, 154 F.3d at 945 (italics in original). In other words, Congress has the power to change a law if it disagrees with the manner in which this Court has construed it,[2] but does not have the power to say that the Court did not construe the law

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[2]This is, of course, subject to the limits of the Constitution. *See* City of Boerne v. Flores, 521 U.S. 507 (1997)(holding that the FRFA exceeded congressional enforcement powers under § 5 as being inconsistent with the scope of constitutional rights and limitations as established by the decisions of the Court).

correctly. The Circuit reasoned that Congress could not, consistent with a separation of powers, say that the Indian tribes always had inherent sovereign authority to prosecute non-member Indians. *See* id.

At about the same time that the Ninth Circuit was deciding the Ex Post Facto implications of the amended ICRA, the Eighth Circuit wrestled with the question of whether the conferral of authority by Congress was one of delegated or sovereign power. In United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), the Eighth Circuit construed the ICRA amendments in a case in which a non-member Indian was challenging a federal prosecution on the basis that Double Jeopardy barred such prosecution due to a prior tribal conviction for the same offense.

In Weaselhead, the district court had held that Duro and Oliphant were federal common law decisions within the ultimate authority of Congress to overrule. 36 F.Supp.2d 908, 914-15 (D.Neb. 1997). A divided panel of the Eighth Circuit

reversed, finding that the authority to ascertain the position of Indian tribes within our constitutional structure was a matter of constitutional law (much like the separation of powers doctrine) "ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat." 156 F.3d at 824. The idea that the amendment could not be given retroactive effect was consistent with the Ninth Circuit's decision in Means, supra. In the end, however, the district court's decision was affirmed by dint of an evenly divided *en banc* court. 165 F.3d 1209 (8th Cir. 1999).

The Ninth Circuit issued the next decision in this continuing effort to resolve what, exactly, the ICRA amendment means with respect to the issue of Double Jeopardy. In United States v. Enas, 255 F.3d 662 (9th Cir. 2001), the appellate court disavowed its decision in Means indicating that Congress cannot overrule the Supreme Court's interpretation of *common law* precepts. The circuit found the decisions in Oliphant, Wheeler, and Duro to be based neither on the Constitution nor

on the statutes of the United States, but that such decisions constituted federal common law. Because in the area of common law Congress reigns supreme, reasoned the Enas court, Congress did have the power to retroactively interpret scope of inherent sovereign power continuously possessed by the tribes. See Enas, 255 F.3d at 673-75.

The Ninth Circuit reasoned that the proposition announced in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)("It is emphatically the province and duty of the judiciary to say what the law is") simply does not apply to common law precepts. Therefore, even though federal common law fills in where Congress and the Constitution have not acted, Congress can always come along and change a judicial statement of what the law is *and was at the time of decision* by means of legislative fiat. Enas, 255 F.3d at 675.

Respectfully stated, such cannot be consistent with the holding in Marbury v. Madison. It is not only the prerogative for this Court to say what the law is, but also necessary to the

independence of the judicial branch to have finality to its decisions. Under the separation of powers doctrine, "neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." Hayburns's Case, 2 U.S. (2 Dall.) 409 (1792).

Given the breathtaking repercussions such a decision would have on the balance of powers established by the Constitution, Petitioner United States does not espouse this position. Rather, it speaks of the ICRA amendment not as having *overruled* Duro, but as having conferred sovereign power where it previously did not exist. See Brief of Petitioner U.S. at 23-26 (arguing that Congress exercised its plenary authority over Indian tribes to restore sovereign authority through the ICRA amendments).

Congress may have such power. The question remains as to whether Congress exercised such power. The language of

the ICRA amendments, as discussed in Part 1, *supra*, does not support such a broad reading.

Statutory construction was the fundamental basis of the Eighth Circuit's decision:

> [T]he ICRA amendments cannot have the effect that they plainly sought to achieve: a retroactive legislative reversal of *Duro*. We need not construe the ICRA amendments as a legal nullity, however. It is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians. ... Nothing in our decision today in any way circumscribes the jurisdiction so conferred.

United States v. Lara, 324 F.3d 635, 640 (8th Cir. 2003)(en banc)(internal citation omitted). This holding is consistent with the statutory framework, case law, and the history of the federal government's sharing of prosecutorial power with the Indian tribes.

4. Construing § 1301(2) as conferring delegated prosecutorial power remedies the jurisdictional gap created by Duro, protects tribal interests in protecting local interests, and does not infringe on any substantial federal interest.

Construing the language actually used to confer delegated federal authority to prosecute non-member Indians in

tribal courts is reasonable in light of both the practical limits of the amendment, given Public Law 280, as well as with the problem of the "jurisdictional gap" created by the Duro opinion. As noted by Amici States of Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon, the most common types of criminal activity reported on the reservations are disorderly conduct, assault battery, intoxication, and driving while intoxicated. *See* Br. for Amici States at 5. The concern of the States is that "Should this Court determine that Congress' effort to restore inherent sovereignty over non-member Indians is invalid, it will reopen a jurisdictional gap, where no government will have jurisdiction over misdemeanors committed by non-member Indians in Indian country." Id. at 7.

First, that the federal government *could* exercise misdemeanor jurisdiction within Indian country is not in doubt. Federal prosecutions may be brought against non-Indians in Indian country under the Assimilated Crimes Act, *codified at* 18

U.S.C. § 13 (1996). Such prosecutions also may be brought against Indians and non-Indians alike for misdemeanors committed on other federal reservations, such as military bases and national park lands. The problem with such prosecutions is that they may burden federal prosecutors as well as federal courts.

Similarly, there is no doubt that tribal courts may exercise delegated authority, as well as aboriginal sovereign authority, and traditionally have done so. Such courts are known as Courts of Indian Offenses. As noted in the brief of Amici Curiae Eighteen American Indian Tribes, "Courts of Indian Offenses were mainly instruments of the BIA [Bureau of Indian Affairs], but included inherent tribal power." Id. at 14, *citing* Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965). As noted by Amici, not only have these courts been upheld since 1888, but approximately 45 tribes still have such courts. *See* Br. for Amici Curiae Eighteen American Indian Tribes at 14 n. 12; 25 C.F.R. § 11.100 (2003).

Construing the ICRA, as amended, as conferring delegated criminal prosecutorial authority is consistent with prior practices regarding Courts of Indian Offenses. Such courts pre-dated the ICRA and were the product of the Bureau of Indian Affairs, which Congress authorized to employ both Indian police and Indian judges. Conferring federal prosecutorial power to tribal court systems, which would then operate in the nature of shared jurisdiction traditionally enjoyed by Courts of Indian Offenses, would be an adequate remedy for the jurisdictional "gap" created by the Duro decision. It also adequately protects federal interests in such prosecutions.

For instance, the tribal officer assaulted by Mr. Lara qualifies as a federal officer because he is funded by the BIA. This officer is also a member of the Spirit Lake Nation and enforces the laws of that Nation. The tribe has the same interest in protecting its officers as does the federal government, the officers being physically one and the same. The tribe also has the same prosecutorial power of the federal government to

address this offense: misdemeanor jurisdiction. For more severe crimes, the federal government exercises jurisdiction pursuant to the Major Crimes Act, 18 U.S.C. § 1153. According to Amici States, the Duro decision did not create a problem with the prosecution of major crimes, but rather only affected the prosecution of minor crimes. That problem has been alleviated by the amendments to § 1301.

The decision of the Eighth Circuit in affirming the grant of delegated power to prosecute misdemeanor crimes committed by non-member Indians in tribal courts therefore addresses the problem presented to Congress by Duro. It is consistent with Congress' duty to provide for the protection of the tribes. It follows the actual language used by Congress to accomplish that goal. Finally, it avoids a number of constitutional questions which otherwise would arise should congressional statements regarding a retroactive "overruling" of this Court's Duro decision be given effect, as it was in the Enas decision. Because the Eighth Circuit's decision is a reasonable

interpretation supported by the language, structure, and history of the ICRA, such decision should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should hold that Respondent's prosecution by the Spirit Lake Tribe was as a matter of delegated federal authority, and that Petitioner's subsequent prosecution in the United States District Court for the District of North Dakota violated his Fifth Amendment right against twice being placed in jeopardy for the same offense.

Dated: December 15, 2003

RESPECTFULLY SUBMITTED.

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